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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 732

PAUL W. BRAMLETT and JAMES J. O'DONNELL, Employees of the Panama Canal Company, and PAULINE F. BLANEY, ALBERT F. HANSON, and LYDIA M. MYERS, Employees of the Canal Zone Government, *Petitioners*

v.

BRIGADIER GENERAL WALTER P. LEBER, Governor of the Canal Zone and President, Panama Canal Company, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul W. Bramlett, and James J. O'Donnell, employees of the Panama Canal Company and Pauline F. Blaney, Albert F. Hanson, and Lydia M. Myers, employees of the Canal Zone Government, all being

appellees in the Court below,[1] through their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 25, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 104-123) (App., pp. 14a-30a) is not yet reported. The opinion of the United States District Court for the District of the Canal Zone, Balboa Division (R. 51-76), as amended (R. 77-78) (App., pp. 31a-53a), is reported at 246 F. Supp. 998.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on July 25, 1967 (R. p. 124) (App., p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the conclusion of the Court below that the Secretary of the Army, who was the author of the disputed Regulations reducing the amount of the tropical salary differential payable to employees of the Panama Canal Company and Canal Zone Government, and who could not be served with process, was

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[1] In conformity with the requirements of the Court below, the appeal designated the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, as the principal appellee. Since its claim was dismissed by the United States District Court for the District of the Canal Zone, and no appeal was taken therefrom, the caption of the case has been changed in this proceeding to designate the actual petitioners.

an indispensable party to the original proceeding, even though his subordinate, the Governor of the Canal Zone and President of the Panama Canal Company was a party, is in conflict with the applicable decisions of this Court holding that the presence of a superior officer can be dispensed with when the relief desired can be enforced against a subordinate official who is before the Court?

2. Whether the United States actually was an indispensable party to the original proceeding because the relief sought by petitioners purportedly would expend itself on public appropriations, as concluded by the Court below, when in fact the costs of operating the Panama Canal Company and the Canal Zone Government are required by the provisions of 2 C.Z.C. §§ 61(a), 62(f) and (g), 70, and 72 to be derived from the annual operating revenues of the Company?

3. Whether under the provisions of 2 C.Z.C. § 146 it is mandatory that each United States citizen employee of the Canal Zone Government and the Panama Canal Company be paid a tropical salary differential of 25 per cent of the aggregate amount of the rate of basic compensation and the tax allowance, and not less than 25 per cent, or is the Secretary of the Army empowered by the provisions of 2 C.Z.C. §§ 142(a)(3) and 155 to promulgate Regulations fixing the rate of tropical differential at any rate which does not exceed 25 per cent of the aggregate amount of an employee's rate of basic compensation and tax allowance?

4. Whether, assuming *arguendo* that the Secretary of the Army can promulgate Regulations fixing the rate of tropical differential at any rate not in excess of 25 per cent of the aggregate amount of the rate of basic compensation and the tax allowance, the provi-

sions of 2 C.Z.C. §§ 141 and 146 which specify that the tropical differential *shall be paid to each employee* who is a citizen of the United States, and who holds a position with the Company—Government, precludes the Secretary from issuing Regulations prohibiting the payment in entirety of the tropical differential to married female employees and to dependent non-head of household employees, except those meeting special qualifications?

STATUTES INVOLVED

The petitioners' claims are predicated upon the following provisions of Title 2 of the Canal Zone Code, as codified in Volume 76A of the United States Statutes At Large (1962), and are set forth in full in Part I of the Appendix annexed hereto (App., pp. 1a-9a):

2 C.Z.C. § 31(1). *Canal Zone Government; administration and functions generally.* 76A Stat. 7. (App., p. 1a.)

2 C. Z. C. § 32. *Appointment and term of Governor.* 76A Stat. 7. (App., p. 1a.)

2 C.Z.C. § 33. *General powers and duties of Governor.* 76A Stat. 7. (App., pp. 1a-2a.)

2 C.Z.C. § 61(a). *Continuation, purposes, offices and residence of the Company.* 76A Stat. 8. (App., p. 2a.)

2 C.Z.C. § 62(b), (e), (f), and (g). *Investment of the United States.* 76A Stat. 8. (App., pp. 2a-4a.)

2 C.Z.C. § 63. *Board of Directors; allowances; quorum; meetings.* 76A Stat. 8. (App., p. 4a.)

2 C.Z.C. § 64. *President of the Company.* 76A Stat. 11. (App., p. 4a.)

2 C.Z.C. § 66(a)(1) and (5). *Specific powers of Company.* 76A Stat. 11. (App., pp. 4a-5a.)

2. C.Z.C. § 70. *Payment of excess funds into Treasury.* 76A Stat. 13. (App., p. 5a.)

2. C.Z.C. § 72. *Appropriations to cover losses.* 76A Stat. 13. (App., pp. 5a-6a.)

2 C.Z.C. § 101(a) and (b). *Appointment and compensation of Government employees.* 76A Stat. 14. (App., p. 6a.)

2 C.Z.C. § 121(a). *Appointment and compensation; duties; delegation of powers; bonds.* 76A Stat. 15. (App., pp. 6a-7a.)

2 C.Z.C. § 141. *Definitions.* 76A Stat. 16. (App., p. 7a.)

2 C.Z.C. § 142. *General rules governing wage and employment practices.* 76A Stat. 16. (App., pp. 7a-8a.)

2 C.Z.C. § 144. *Compensation.* 76A Stat. 17. (App., pp. 8a-9a.)

2. C.Z.C. § 146. *Additional allowance and differential.* 76A Stat. 17. (App., p. 9a.)

2. C.Z.C. § 155. *Administration by President; regulations; delegation of authority.* 76A Stat. 19. (App., p. 9a.)

REGULATIONS INVOLVED

The Regulations of the Secretary of the Army which effected the permanent reduction in the rate of the tropical differential, and which prohibited the payment of the tropical differential to married women employees of the Panama Canal Company and Canal Zone Government who are citizens of the United States, and to dependent non-head of household employees, except under special circumstances not herein pertinent, were promulgated on October 10, 1964 in 29 F.R. 14024, and by 31 F.R. 12202, 12344, were transferred to 35 C.F.R.(1967 Rev.) § 253.135, having formerly been found in 5 C.F.R.(1964 Rev., 1966 Supp.) § 1204.12. (App., pp. 10a-12a.)

EXECUTIVE ORDER INVOLVED

The authority under which the Secretary of the Army purported to act in issuing the disputed Regulations of October 10, 1964, *supra,* is contained in Executive Order 11171 of August 18, 1964, 29 F.R. 11897, now found in 3 C.F.R.(1964 Supp.) pp. 174-176. (App., pp. 12a-13a.)

STATEMENT

Petitioners are 5 United States citizens who, for many years, have been employed by the Canal Zone Government and the Panama Canal Company in manual and non-manual categories. Two of the petitioners, Pauline Blaney, and Lydia Myers, are married women whose spouses are also employed by the Canal Zone Government—Panama Canal Company. The petitioners collectively represent a cross-section of the civilian workforce of more than 3,500 United States citizens who hold positions with the Canal Zone Government—Panama Canal Company. These petitioners, together with the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, an employee-labor organization composed of United States citizen employees holding positions with the Government—Company, instituted proceedings in the District Court on November 12, 1964 against the Governor of the Canal Zone who, pursuant to the provisions of 2 C.Z.C. § 64, also serves *ex officio* as president of the Panama Canal Company, and against the Secretary of the Army, who, pursuant to the provisions of 2 C.Z.C. §§ 31 and 62, is the official named by the President of the United States in Executive Order 10595 of February 7, 1955, 3 C.F.R.(1954-1958 Comp.) p. 242, and Executive Order 11171, *supra,* to supervise the functions of the Canal Zone Government, to act as the sole stockholder of the Company, and to coordinate their

wages and employment practices, for a judgment declaring certain Regulations promulgated by the Secretary of the Army affecting the payment of the tropical differential in salary to be in conflict with various provisions of the Canal Zone Code, principally 2 C.Z.C. §§ 141 and 146, and therefore to be invalid, and for a permanent injunction against their application and enforcement by said officials (R. pp. 1-19). Jurisdiction of the District Court was invoked under the provisions of 3 C.Z.C. § 141, 76A Stat. 56, and 5 C.Z.C. §§ 321-322 and 1501, 76A Stat. 298, 346.

The disputed Regulations, which were promulgated on October 10, 1964, *supra* (App., pp. 10a-12a), accomplished the following pertinent results:

> 1. Subject to the provisions of a savings clause which protected existing employees against any immediate loss of compensation, reduced the amount of the tropical differential from 25 per cent to 15 per cent of the aggregate amount of the established basic compensation and the tax allowance, and provided for its further review and adjustment periodically; and
>
> 2. Eliminated the payment of the tropical differential to (a) married women whose husbands also resided in the Canal Zone or in the Republic of Panama, unless legally separated, or unless said husbands were dependent upon their wives for 51 per cent of their support, and (b) dependent non-head of household employees.

Since the dates when these Regulations were effectuated, each of the petitioners has sustained, and is continuing to sustain a loss of compensation.[2]

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[2] These Regulations, and their interim predecessors of July 29, 1964, 29 F.R. 10490, were effectuated retroactively to July 5, 1964 for non-manual category employees, and to July 20, 1964 for manual category employees (R. pp. 7-10).

As the petitioners were unable to obtain service upon the Secretary of the Army, the respondent filed a Motion to Dismiss the Complaint or For Summary Judgment on the jurisdictional grounds that (1) the Secretary was an indispensable party; (2) this was in reality an unconsented suit against the United States; and (3) the Union had no standing to maintain the action, and on the substantive ground that the Regulations were consistent in all respects with the applicable statutes, and therefore valid (R. pp. 20-48). However, petitioners' Cross-Motion for Declaratory Judgment (R. pp. 48-50) was sustained by the District Court on November 9, 1965, and amended on November 10, 1965, *Canal Zone Central Labor Union, et al.* v. *Fleming,* 246 F. Supp. 998 (App., pp. 32a-53a), on the following major grounds:

1. The Secretary of the Army was not an indispensable party to the action because the injunctive relief sought by the petitioners could be accomplished by the issuance of a permanent injunction against the Governor-President.

2. The petitioners' cause of action, as it pertained to the Governor, was not an unconsented suit against the United States.

3. The only reasonable interpretation that could be placed upon 2 C.Z.C. § 146 was that its provisions made mandatory the payment of a tropical differential of 25 per cent, and not less than 25 per cent, to United States citizen employees, and the Secretary of the Army did not possess discretionary authority to alter or reduce this percentage.

4. Under the provisions of 2 C.Z.C. §§ 141 and 146, each United States citizen employee was entitled to be paid the 25 per cent tropical differential regardless of sex, marital status, or dependency status.

5. The Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, did not possess standing to sue.

On December 6, 1965 the Governor, pursuant to the provisions of 28 U.S.C. § 1294(2), noted an appeal to the United States Court of Appeals for the Fifth Circuit from an order permanently enjoining him from enforcing the Regulations issued by the Secretary of the Army (R. pp. 85-86). This order was stayed by the District Court on December 10, 1965 pending final action on this appeal (App., pp. 58a-59a). A cross-appeal was not filed by the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, from the dismissal of its claim.

On July 25, 1967 the Court below concluded the judgment of the District Court should be reversed, and the action dismissed, for the following three reasons (App., pp. 14a-30a):

(1) The Secretary of the Army was an indispensable party to the original proceeding because specific action by him was deemed necessary to reinstate the payment of the full 25 per cent tropical differential, and thereby effectuate the relief sought.

(2) Since the relief sought purportedly would expend itself on public appropriations, the United States was deemed to be an indispensable party and the District Court for the District of the Canal Zone was not a court in which the Government had consented to be sued.

(3) Reaching the merits, the Regulations issued by the Secretary of the Army were construed to be valid and not in conflict with the controlling

sections of the Canal Zone Code wherein they reduced the rate of the tropical differential from 25 to 15 per cent, and prohibited the payment of the tropical differential in entirety to married women whose spouses resided in the Canal Zone or the Republic of Panama and were self supporting, and to dependent non-head of household employees.

REASONS FOR GRANTING WRIT

1. The majority decision of the Court below (one Judge concurring in the result, but dissenting as to this issue) that the Secretary of the Army, who authored the disputed Regulations reducing the amount of the tropical differential payable to employees of the Panama Canal Company and Canal Zone Government, and who could not be served with process in the original proceeding, was an indispensable party, even though his subordinate, the Governor of the Canal Zone and President of the Panama Canal Company, 2 C.Z.C. §§ 31(1) and 64 (App., pp. 1a, 4a), was a party, is in direct conflict with the applicable holdings of this Court that the presence of a superior officer is unnecessary when, as here, the relief desired can be enforced against a subordinate official who is before the Court. *Ceballos* v. *Shaughnessy,* 352 U.S. 599, 603-604; *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 52-53; *Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior* v. *Grimes Packing Company, et al.,* 337 U.S. 86, 96-97; *Williams* v. *Fanning,* 332 U.S. 490, 493-494. These cases make it clear that it is only when the decree granting the relief sought will require the superior officer to take action, either by exercising directly a power conferred upon him, or by having a subordinate exercise it for him, that the superior's presence is indispensable.

Although the Court below was of the opinion that the Secretary of the Army would have to take the specific action of authorizing the payment of any former rate of differential to petitioners in order to vindicate their rights, this reasoning is specious as it would be completely unnecessary for the Secretary to perform a single act, either directly or through a subordinate, to effectuate the relief sought by the petitioners. If the Secretary's disputed Regulations are declared to be invalid, and if a permanent injunction enjoining the Governor of the Canal Zone-President of the Panama Canal Company from enforcing them is issued, all action necessary under existing law to restore the petitioners to their former *status quo* can be taken by respondent. Prior to the issuance of the Secretary's Regulations in 1964, the payment of the 25 per cent tropical differential to petitioners was predicated solely upon the exercise by respondent of the power conferred upon him in 2 C.Z.C. §§ 101 and 121 (App., pp. 6a-7a) to prescribe the compensation of employees of the Government—Company, and to include therein a tropical differential of not more than 25 per cent of their basic compensation. Since this power to fix and pay the tropical differential had been vested in and exercised exclusively by the Governor-President during the 52-year period between the grant of such authority to him in § 4 of the Act of August 24, 1912, ch. 390, 37 Stat. 560, 561, and the issuance of the Secretary's Regulations, and since Congress has not seen fit to this day to revoke the grant of this power, it is patent that the exercise of this power by respondent is *all* that is required to effectuate the desired relief.

This Court is therefore urged to undertake a realistic review of the governmental organization of the

Government—Company dual entity. Clarification of the division of power and of the delegation of power between the Secretary of the Army and the Governor-President is vitally needed.

While the Court below recognized that this Court has stressed the need for employing practical considerations in determining when a superior officer is an indispensable party, it failed to utilize such considerations in reaching its decision. At all times the interests of the Secretary of the Army could have been, and were in fact, ably defended by the United States Attorney for the Canal Zone, and by attorneys from the Department of Justice. The forum before which the issues were originally argued was an especially appropriate one because of its intimate knowledge of the laws of the Canal Zone and of the composition of the Government—Company structure. This forum was in a position to decide the issues promptly, and was reasonably convenient for all of the parties. Hence, the action of the Court below in permitting the absence of the Secretary of the Army as a party to the proceeding, which absence was attributable solely to the Secretary's desire to capitalize upon the difficulties encountered in serving him with process, to defeat a determination of the real issues on their merits at the point of their origin disregards all of the practical considerations involved, and necessitates the exercise by this Court of its powers of supervision.

2. The Court below erred in concluding that the original action was actually an unconsented suit against the United States in a court in which the Government had not agreed to be sued. Although the Court stated that the United States was an indispensable party because, "There is no dispute that the direct effect of

the relief sought by appellees would expend itself on public appropriations" (R. p. 113), this conclusion is incorrect. Petitioners have specifically taken issue with this argument at all stages of the proceeding in view of the provisions of 2 C.Z.C. § 61 *et seq.* (App., pp. 2a-6a) that require the Panama Canal Company to be financially self-sustaining, and to defray from its annual operating income the net costs of operation of the Canal Zone Government.

Under the provisions of 2 C.Z.C. § 66 (App., pp. 4a-5a), the Panama Canal Company is authorized to maintain and operate the Panama Canal, and to make or furnish sales and services incident thereto to users, to Government employees and agencies, and to others. From the proceeds thus derived the Company is authorized by 2 C.Z.C. § 70 (App., p. 5a) to retain the amount necessary for its annual working capital requirements and for plant replacement and expansion, and to pay the surplus into the Treasury annually. The annual working capital requirements include (1) under 2 C.Z.C. § 62(e) (App., p. 2a), the payment of interest on the net direct investment of the United States therein; (2) under 2 C.Z.C. § 62(f) and (g) (App., pp. 3a-4a), the net costs of operation of the Canal Zone Government, which are "deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole; and, under 2 C.Z.C. § 72 (App., pp. 5a-6a), amounts required to repay any appropriations made by Congress to cover losses incurred in the Company's authorized activities. Any surplus must, under 2 C.Z.C. § 62(g) (App., pp. 3a-4a), be applied to defray annual annuity payments due the Republic of Panama under existing treaties, and, under 2 C.Z.C. § 62(f) (App., pp. 2a-3a), to repay amounts of directly contributed capital.

Under these circumstances there is no conceivable way in which the relief sought by petitioners could expend itself on public appropriations. Rather, by law, it must expend itself directly against the dual entity of the Panama Canal Company—Canal Zone Government which in turn must ultimately charge the amount of the differential payments, whether fixed at 15 per cent or 25 per cent, against the shippers who use the Canal and against the others who must avail themselves of its services, including the petitioners and all other employees who must utilize the facilities and services available only from the monopolistic enterprises conducted by the Company for profit. Since the respondent is the responsible executive officer of both the Company and Government, and as such is authorized by 2 C.Z.C. §§ 101, 121 and 146 (App., pp. 6a-7a, 9a) to employ the petitioners and prescribe their compensation, including the rate of tropical differential that they may receive, his presence alone before the Court was all that was necessary for the effective grant of the requested relief, and the presence of the United States was totally unnecessary. Hence, this Court should exercise its reviewing powers.

3. As noted previously, during the 52-year period that elapsed between the passage of § 4 of the Act of August 24, 1912, *supra,* and the promulgation of the challenged Regulations by the Secretary of the Army on October 10, 1964, the employees of the Canal Zone Government—Panama Canal Company and their predecessor organizations received, at all times, as an additive to their basic compensation, a tropical differential of 25 per cent. Payment of the tropical differential at this rate was deemed mandatory under this statutory language (repeated in Executive Order 1888 of Feb-

ruary 2, 1914) which provided that the compensation of employees "shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States." Thus, in light of this historical background of the tropical differential payments, the conclusion by the Court below that the Secretary's Regulations reducing the rate of the tropical differential from 25 to 15 per cent constituted a valid exercise of the discretionary powers conferred upon him by 2 C.Z.C. §§ 142 and 155 and by Executive Order 11171, *supra* (App., pp. 12a-13a), is erroneous, and in conflict with the numerous holdings of this Court that specify when the terms of earlier legislation (Act of August 24, 1912, *supra*) are carried forward in a later enactment (2 C.Z.C. § 146) without material change, effect should be given to the accepted construction and administrative practice under the earlier statute. *United States* v. *Midland-Ross Corp.*, 381 U.S. 54, 59; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 332; *Posadas* v. *National City Bank*, 296 U.S. 497, 505; *Old Colony Railroad Co.* v. *Commissioner*, 284 U.S. 552, 557; *National Lead Co.* v. *United States*, 252 U.S. 140, 146-147.

While, as noted by the District Court (App., p. 38a) "the words 'in excess of' frequently connote a sum less than but not greater than," such was not the meaning that Congress intended them to have in this instance. Instead, as found by the District Court, the obvious purpose of this language was merely to place a ceiling upon the amount of the tropical differential without conferring discretion upon the Secretary to authorize the payment of less than the full 25 per cent.

Hence, the conclusion by the District Court, which was rejected by the Court below, that the provisions of the opening paragraph of 2 C.Z.C. § 146 and of subparagraph (2) thereof, when read together, are mandatory and require that the amount of the tropical differential paid to United States citizen employees shall be 25 per cent of their basic compensation and the tax allowance, but "not in excess" of that amount, is sound, and its adoption should be carefully considered by this Court (App., p. 39a). Such a construction is far more consistent with the legislative history of § 4 of the Act of August 24, 1912, *supra,* as expressed in the statement of Representative Adamson, 48 Cong. Rec. 6786 (App., p. 25a) than the position adopted by the Court below.

The conclusion of the Court below leaves the Secretary of the Army in possession of delegated powers, the limits of which have not been defined by Congress. Such delegations, which fail to prescribe standards for the guidance of the recipient of the delegated power with sufficient exactness to enable him to understand the extent of his authority, have been repeatedly declared invalid by this Court. *United States* v. *Rock Royal Co-Operative, Inc.,* 307 U.S. 533, 574; *Schechter Corp.* v. *United States,* 295 U.S. 495, 529-530, 541-542; *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 414-415, 418-419, 421, 430; *Hampton & Co.* v. *United States,* 276 U.S. 394, 407-409. Inasmuch as the Secretary is not required to predicate the Regulations upon any criteria established by Congress, or to make any findings in support of his action, this Court should consider and decide whether the proper limits of delegation of authority have been transcended in this instance.

4. Assuming *arguendo* that the Secretary of the Army has properly promulgated the Regulations fixing the rate of the tropical differential at 15 per cent of the aggregate amount of petitioners' basic compensation and tax allowance, petitioners submit that the Court below erred in concluding that the Secretary also possessed the power under 2 C.Z.C. § 142(b)(1) (App., p. 8a) to preclude by regulation the payment of any portion of the tropical differential to married female United States citizen employees and to dependent non-head of household employees, except those meeting special qualifications not pertinent to this case. This conclusion by the Court below that the provisions of § 142(b)(1) are intended to permit the Secretary to exclude *any* United States citizen employee from receiving the tropical differential, is improperly based upon speculation as to the Congressional intent in employing seemingly broad language therein. Such speculation is unwarranted in view of the legislative history of § 142(b)(1) which demonstrates that the language employed was actually intended to be given a very narrow construction.

During the debate on the floor of the House of Representatives of the provisions of the bill that was subsequently enacted and is now codified in § 142(b)(1), the need for clarification of the language permitting the "exclusion of any employee" from any provision of the Act was recognized by Representative Robert W. Hemphill of South Carolina who had served on the Subcommittee of the House Committee on the Post Office and Civil Service which had heard testimony on the several drafts of the bill, and which had reported the final bill to the House of Representatives. The following explanation by Representative Hemphill at 104

Cong. Rec., Part 9, p. 11387, establishes beyond question that the conclusion reached by the Court below was never intended by Congress:

> *Mr. Hemphill.* Mr. Speaker, I have asked for this time only for the purpose of clarifying one section of the bill and one part of the report.
>
> Under section 3 of the bill, item (b-1) on page 7, the President of the United States as administrative authority under the terms of this legislation, is authorized to exclude any employee or position from the act or provision of the act. I would like to read into the RECORD at this point a part of the able report made by the chairman of the subcommittee to the full committee. Page 3 of that report says:
>
> > Section 3 authorizes and directs the head of each department or agency operating in the Canal Zone to conduct the employment and wage practices in accordance with the principles of the memorandum of understanding, the provisions of this bill, and regulations prescribed by or under the authority of the President. Also, it authorizes the President to exclude any employee from this act. *This exclusion is necessary in case of the Governor of the Canal Zone, the Deputy Governor, the President of the Panama Canal, and other similar officials.* [Emphasis added.]
>
> I read that into the RECORD for the purpose of clarification.

In light of this explanation, it is evident that the terms "exclude any employee or position" were not used in an all-inclusive sense which encompassed all employees, but rather were intended to have a very limited and definite meaning that excluded the "rank

and file" employees such as petitioners. *Cf. Cole* v. *Young,* 351 U.S. 536, 548, 551. Hence, the language of § 142(b)(1) should be construed as a very narrow limitation upon the provisions of 2 C.Z.C. § 146 which specify that a tropical differential shall be paid to each employee, *i.e.,* each individual holding a position,[3] who is a citizen of the United States, and should not be permitted to deprive married women and dependent non-heads of households from receiving the full amount thereof. This Court's power of supervision should therefore be invoked to prevent the enforcement of invalid regulatory provisions that are plainly out of harmony with the statutes. *Dixon* v. *United States,* 381 U.S. 68, 74; *Manhattan Co.* v. *United States,* 297 U.S. 129, 134; *Miller* v. *United States,* 294 U.S. 435, 439-440; *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599, 610.

Unless this Court exercises its powers of review over this issue, the affirmation by the Court below of the action of the Secretary of the Army will result in a continuing flagrant violation of the Government's policy of nondiscrimination and equal employment opportunity as set forth in Ch. 713-3, *Federal Personnel Manual,* issued by the Civil Service Commission pursuit to § 161 of the Revised Statutes, 5 U.S.C. § 22. Section 1-1 of this Chapter states the following General Policy of the Government:

> The policy of the Government that there shall be no discrimination based on such factors as race, religion, political affiliation, physical handicap, sex, and other matters discussed in this chapter has been stated so clearly and unequivocally in

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[3] See the definition of "employee" in 2 C.Z.C. § 141 (App., p. 7a).

> various laws, Executive orders, public statements of the President, rules, and regulations as to leave no room for doubt as to the broad application of the policy. * * * [4]

The decision of the Court below is also in conflict with a decision of the Comptroller General, 26 Comp. Gen. 660, 662, rejecting an earlier attempt by the Secretary of War in 1947 to restrict the payment of a foreign service differential established under § 2 of the Act of July 3, 1930, 46 Stat. 1005, to the head of a family where two or more members of the family lived under the same roof and qualified for the differential. The conclusion of the Comptroller General that the authority of the head of the department to fix salary rates for positions could "not be so exercised as to discriminate against the incumbent of a position so as to pay him at a salary rate less than that fixed for the position solely because of the family status of such incumbent," is sound, and should have been applied by the Court below to preclude the discrimination that now exists against married female employees and non-head of household employees of the Government-Company.

CONCLUSION

Since the questions presented are of general importance to several thousand United States citizen employees of the Canal Zone Government and Panama Canal Company, as well as employees of other federal agencies stationed in the Canal Zone, and since the decision below conflicts with other decisions of this

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[4] See Executive Order 10980, of December 14, 1961, 26 F.R. 12059, 3 C.F.R. (1959-63 Comp.) p. 500.

Honorable Court in several aspects, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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